SOUTHERN FINANCE CO. BHD.

v.

SAFFRON SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-24-36-89]
22 NOVEMBER 1990

CIVIL PROCEDURE: *Distinction between cause of action estoppel and issue estoppel - Identical issues in separate applications - Effect of - Public policy - Finality in litigation - Delay of filing present application - Bona fides.*

The plaintiff applied for an order that the said land belonging to the defendant and charged to the plaintiff be sold by public auction under ss. 256 and 257 of the National Land Code 1965 to satisfy the total sum due to the plaintiff at the date of the order together with interest until the date of full payment. The originating summons was served by leaving a copy at the registered office of the defendant. A Certificate of Non-Appearance was filed by the plaintiff's solicitors and a notice of appointment to hear the originating summons was taken out and the matter was fixed to be heard on 12 September 1989. The said notice of appointment was also left at the registered address of the defendant. This hearing date was brought forward to 12 July 1989 and an order in terms of the originating summons was granted and the auction date was fixed as at 20 October 1989.

The plaintiff then sought directions to carry out the auction and the fixing of a reserve price; this summons was also the defendant's premises. On 14 October 1989, IJM Engineering & Construction Bhd. applied to intervene and to take part in the proceedings for the purpose of objecting to and varying the amount payable to the plaintiff out of the proceeds of the auctioned sale of the disputed lands. Their application was dismissed.

The defendant then applied by a summons in chambers dated 16 November 1989 for an order to stay the auction pending the full disposal of an application to set aside the plaintiff's originating summons (the earlier application). The defendant's application was dismissed by the Senior Assistant Registrar (SAR).

On 3 March 1990 the defendant applied again by summons in chambers to set aside the order for sale and the order granted by the SAR giving directions for the auction of the disputed lands (the present application).

At the hearing of the defendant's present application, the plaintiff raised a preliminary objection that the defendant had already raised the same issues in their earlier application and that the doctrine of issue estoppel should apply to preclude the issues to be relitigated as the Court had ruled that they were unsustainable. The defendant however contended that the application to set aside the orders was different from the earlier action which was to stay the auction.

Held:

[1] The issues raised in the present application of the defendant are almost identical as the issues raised in the earlier application. The defendant had argued at length on all the issues except the issue relating to the imposition of exorbitant and compoundable interest. The omission by the defendant to argue this issue does not preclude the application of the doctrine of issue estoppel as that issue was raised in the affidavit in support of the earlier application.

[2] Even if a new issue had been raised in the present application, it should have been raised earlier particularly when in the earlier application, the defendant had raised a wide range of issues some of which were not pursued in the present application.

[3] From the notes of proceeding of the SAR, when she heard the summons-for-directions on 22 June 1990, the defendant was represented by Counsel T who also asked for a postponement of the hearing of the summons in order to file in a valuation report - however T never said anything about the failure on the part of the plaintiff to serve the summons-for-direction on the defendant.

[4] In its earlier application to stay the auction, it was stated that the said auction should be stayed pending the full disposal of an application to set aside this originating summons on the defendant's undertaking to file the same within 7 days of the order granting a stay. However, after dismissal of that action, the defendant did nothing until 3 1/2 months later when it filed its application to set aside the two orders. No explanation was given for the delay and therefore its *bona fides* in relation to this application are questionable.

[5] In the circumstances of this case, the doctrine of issue estoppel is applicable against the defendant as there must be finality in litigation.

[Defendant's application dismissed.]

Cases referred to:
Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. [1988] 1 CLJ (Rep) 190 ***(foll)***
Thoday v. Thoday [1964] Law Reports p. 181 ***(foll)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 256, 257

Other sources referred to:
Halsbury's Laws of England 4th Edn. Vol. 16 para. 1530
Spencer-Bower & Turner Res Judicata 2nd Edn.

For the plaintiff - Lim Eng Hoe; M/s. Mah-Kok & Din
For the defendant - Teh Meng Teck; M/s. Cheah & Teh

JUDGMENT

Lim Beng Choon J:

The defendant applied by way of a summons-in-chambers dated 3 March 1990 for an order that:

(i) the order of sale made on 12 July 1989 by this Court be set aside and/or

(ii) the order of this Court made on 7 September 1989 be set aside

(iii) the costs of the application be costs in the cause.

In order to appreciate the controversies in this case it is necessary to state briefly the background of this case.

The plaintiff by this originating summons issued on 15 March 1989 applied for an order that the land belonging to the defendant held under PN 1551 Lot 35895 Mukim Kuala Lumpur (hereinafter referred to as the disputed lands) and charged to the plaintiff under the charge registered in the Registrar of Charge Presentation No. 18684/84 Vol. 357 Folio 69 be sold by public auction under ss. 256 and 257 of the National Land Code (the NLC) to satisfy the

total sum due to the plaintiff at the date of the order together with interest until the date of full payment. It also asked for an ancillary order directing the Senior Assistant Registrar of the Court (the SAR) to make the necessary orders or directions for carrying out the auction and to give vacant possession of the disputed lands to the plaintiff within 7 days after the sale of the disputed lands. This originating summons was served on the defendant by leaving the same in a cover addressed to the defendant at its registered office at 33A, Jalan SS2/55 47300 Kuala Lumpur. A certificate of non appearance was filed by the plaintiff's solicitors on 4 April 1989. A notice of appointment to hear the originating summons was taken out on the same date and it was fixed for hearing on 12 September 1989. Again the said notification was served by leaving it in a cover addressed to the defendant at its registered office at 33-A, Jalan SS2/55 47300 Kuala Lumpur. However the plaintiff applied to the SAR by a Certificate of Urgency to bring forward the date of hearing of this originating summons from 12 September 1989 to 12 July 1989. At the hearing of this originating summons I granted an order in terms of the said originating summons and I fixed the auction date as at 20 October 1989. On 12 August 1986 the plaintiff applied to the SAR by way of a summons for directions for directions to carry out the auction of the land and the fixing of a reserve price. The said summons was similarly served on the defendant by leaving it under cover at the same address. On 14 October 1989 a company known as IJM Engineering & Construction Bhd. applied to intervene and to take part in the proceedings for the purpose of objecting to and varying the amount payable to the plaintiff out of the proceeds of the auctioned sale of the disputed lands. The application of the proposed intervenor was dismissed on 14 November 1989. Thereafter the defendant applied by way of summons-in-chambers dated 16 November 1989 for *inter alia* an order to stay the auction pending a full enquiry into the actual amount due to the plaintiff and/or the auction be stayed pending the full disposal of an application to set aside this originating summons on the defendant's undertaking to file within 7 days of the order. In the affidavit in support affirmed by its director one Kenneth Kang Kok Kwang on 16 November 1989, he said, *inter alia*, that the service of this originating summons was made at an old office of the Project Construction Consultant at Petaling Jaya and the defendant had no notice of the existence of this originating summons until an advertisement appeared in the newspaper the 'Star' on 11 August 1989 indicating that a writ action had been instituted against Saffron Sdn. Bhd. and 10 others in the High Court Kuala Lumpur in Suit No. D2-22-470-89 by Southern Finance Co. Bhd. The defendant had moved to Taman Tun Dr. Ismail sometime in 1987 and the main contractor in instituting another suit against the defendant also served all their papers on the defendant at its new address. It was also averred that on an examination of this originating summons the defendant was disputing the amount due to the plaintiff as the interest rate and the penalty interest charged was clearly exorbitant and/or bad in law or in breach of Bank Negara regulations. Certain documents were produced and annexed to support this contention. The defendant's complaints about the interest payable was that although the contractual rate of interest was 14.5% p.a. the plaintiff was charging interest at the rate of approximately 19.5% above the contractual rate and this was therefore quite clearly interest upon interest and/or compoundable interest. It was also averred that the plaintiff was directly or indirectly responsible for the failure of the project as it had failed to release any part of the end-financing agreed upon, thereby resulting in the purchasers having been unable to obtain their loans and the main contractor not being paid. It was then said that the plaintiff had since the alleged date of default in payment waited about 3 years before issuing the Form 16D notice resulting in a situation whereby the interest and penalty interest was nearly double the original principal amount. Complaint was also directed against the plaintiff's valuation report filed with this originating summons.

It said that the valuation report was misleading and that the defendant was in a position to show that the project was worth about RM10 million for the disputed lands and the condominiums. As the main contractor was prepared to take over the project and be liable to pay the plaintiff its rightful dues provided, it was reasonable that a stay of the proceeding should be granted to the defendant.

When the application of the defendant to stay the auction came on for hearing on 17 November 1989 the then Counsel for the defendant in his submission elaborated at length on what had been said in the affidavit in support affirmed by Encik Kenneth Kong on 10 November 1989 except the question of the charging of exorbitant and compoundable interest. Counsel for the plaintiff also made his submission. After hearing both Counsel I dismissed the application of the defendant. The defendant had not thought it fit to appeal to the Supreme Court against my decision.

On 3 March 1990 the defendant applied again by summons-in-chambers for an order as stated in the opening paragraph of this judgment to set aside the order for sale of the disputed land granted on 12 July 1989 and also the order granted by the SAR on 7 September 1989 giving directions for the auction of the disputed lands. In the affidavit in support affirmed on 3 March 1990 by Kenneth Kong Kok Kwan, the director of the defendant company, the complaints of the defendant case can be summarised as follows:

1. That this originating summons and the summons-for-directions was served not at the defendant's place of business but at its Project Constructive Consultant's office [which it was admitted was also the defendant's registered office (see para. 21 of the said affidavit encl. 24];
2. There was a miscalculation on the part of the plaintiff and the sum stated in the order for sale should be RM4,302,021.13 and not RM4,336,948.96;
3. The plaintiff had raised the interest rate from 13.5% p.a. in May 1989 to 14.5% p.a. in July 1989 without any notice to the defendant on lawful basis especially when the plaintiff's base lending rate had not changed since 1 July 1989;
4. The defendant denied owing the sum alleged in the various affidavits filed in this action by the plaintiff as the plaintiff's figure was based on penalty interest which was exorbitant, unlawful and unenforceable;
5. Since 1987 the defendant moved to No. 59, Lorong Rahim Kajai 3, Taman Tun Dr. Ismail 60000 Kuala Lumpur.

It is to be noted that the complaints of the defendant in his application to set aside the two orders of the Court are almost identical with the complaints contained in Kenneth Kang Kok Kwang's application dated 16 November 1989 in support of the defendant's earlier application to stay the auction.

At the hearing of the defendant's application on 15 June 1990 Counsel for the plaintiff raised a preliminary objection. He submitted that as the defendant had, by their earlier application dated 16 November 1989 to stay the auction, raised the same issues as those raised in the present application the doctrine of issue estoppel should apply to preclude the issues to be relitigated again since this Court had already at the hearing of the earlier application ruled that the issues could not be sustained. The Counsel for the defendant, however, said the cause of action in the present application namely to set aside the two Court orders was different from the cause of action in the earlier application which was to stay the auction.

Now there is a distinction between "cause of action estoppel" which is the simplest estoppel *per rem judicatum* and 'issue estoppel'. In *Spencer-Bower and Turner Res Judicata* 2nd Edn. it is stated at pp. 150 to 151 that:

> Cause of action estoppel is applicable solely to the case where the same cause of action is alleged in successive proceedings. It is a reciprocal estoppel, and operates both as an estoppel *per rem judicatam* and conversely by way of merger. The maxim *transit in rem judicatam* prevents a successful plaintiff from re-asserting in a second proceeding the cause of action which he has already made the subject of a judgment in the first. This is the operation of the doctrine of merger. On the other hand the maxim *interest rei publicae sit finis litium* denies the unsuccessful defendant the opportunity of relitigating a case which he has already lost. This is estoppel *per rem judicatam*. (And the case of plaintiff and defendant may be reversed when the opposite circumstances obtain). But where one cause of action has been the subject of final adjudication between parties, those determinations of particular issues which are its essential foundation, without which it could not stand, may be used as the basis of issue estoppels between the same parties when another cause of action altogether is set up.

To support his statements the learned author cited the following passage of Diplock LJ in *Thoday v. Thoday* [1964] Law Reports p. 181 at p. 198:

> The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a Court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the Court has in the first litigation determined that it was not, or deny that it was fulfilled if the Court in the first litigation determined that it was.

Our Supreme Court in *Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor.* [1988] 1 CLJ (Rep) 190 adopted a similar approach when Wan Suleiman SCJ said at p. 150:

> We agree with the learned Judge that "issue estoppel" can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same.
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> *Halsbury's Laws of England* - 4th Edn. Vol. 16 para. 1530 succinctly sets out the law, which is cited hereunder:
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> > A party is precluded from contending contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out.

In *Yat Tung Investment Co. Ltd. v. Dao Heng Bang Ltd. & Anor*. [1975] AC 581 the Privy Council applied the doctrine of *res judicata* in its wider sense and said that it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. Thus Lord Kilbrandon said at p. 590 of the reported case:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the Judge says:
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> > Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from, negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Transposing the legal principles laid down in the aforementioned case to the present case, the issues raised in the present application of the defendant (as I have stated earlier) are almost identical as the issues raised in the earlier application of the defendant. The learned Counsel at the hearing of the earlier application of the defendant had argued at length on all the issues except the issue relating to the imposition of exorbitant and compoundable interest. The omission on the part of the Counsel does not on the authorities cited above preclude the application of the doctrine of issue estoppel particularly when that issue was raised in the affidavit in support of the earlier application. Furthermore even had there been a new issue raised in the present application, it should have been raised in the earlier application particularly when in the earlier application the defendant had raised a wide range of issues some of which were not pursued in the present application, which the defendant chose to abandon.

Another important point to note is that in its affidavits affirmed by its director it gave the impression that because of the failure to serve the summons-for-direction the defendant was therefore not represented at the hearing of the summons. From the notes of proceeding of the SAR when she heard the summons-for-directions on 22 June 1990 the defendant was represented by Counsel by the name of Encik Teh who argued the matter on behalf of the defendant. Encik Teh also asked for a postponement of the hearing of the summons in order to file in a valuation report but his request was strongly objected by Counsel for the plaintiff at that hearing on the ground that the defendant had been given nearly one year to prepare its valuation report but it did nothing. Encik Teh never said anything about the failure on the part of the plaintiff to serve the summons-for-direction on the defendant. One final point which I had taken into consideration is that in its earlier application to say the auction it was stated in the relevant summons-in-chambers dated 16 November 1989 that the said auction should be stayed pending the full disposal of an application to set aside this originating summons **on the defendant's undertaking to file the same within 7 days of the order granting a stay.** Yet after I had dismissed the application for a stay the defendant did nothing until

some 3½ months later that is on 3 March 1990 when he filed his application to set aside the two orders. No explanation was given for the delay. I therefore must question the *bona fide* of his application.

In the circumstances I am satisfied the doctrine of issue estoppel is applicable against the defendant. There must be a finality in litigation. The application of the defendant to set aside the order of the Court dated 13 July 1989 and the second order of the Court dated 7 September 1989 is dismissed with costs.

Also found at [1991] 3 CLJ 1867